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VALIDITY OF MINIMUM WAGE STATUTES APPLICABLE TO PRIVATE EMPLOYMENT

Attention was called recently to the opinion of the Supreme Court of the United States in *Adkins v. Children's Hospital* (43 Sup. Ct. 394, 24 A. L. R. 1238), in which an Act of Congress, applicable generally to all occupations within the District of Columbia, giving a board and its advisers the power to fix for women a minimum wage sufficient, in its opinion, to supply the necessities of life, invalid on the ground that it was violative of the provisions of the Federal Constitution against deprivation of liberty or property without due process of law. It may be mentioned in this connection that there is no inhibition in the Constitution of the United States against the enactment by Congress of laws impairing the obligation of contracts. However, this statute was attacked upon the ground that it authorized an unconstitutional interference with the freedom of contract included within the guarantees of the due process clause of the Fifth Amendment, which contains the provision already adverted to relating to liberty and property. It is stated in the opinion of the Court that the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, and in support of this statement many cases are cited. The Court states that in making contracts of employment, generally speaking, the parties have an equal right to obtain from each other the best terms they can as a result of private bargaining.

While the proposition last mentioned seems to be well supported by decisions, it is well known that as matter of fact one of the parties is more often than otherwise

placed at such a disadvantage that there is no such thing as bargaining about the matter. It is sometimes necessary for Courts to take a situation as it is, not as in theory it is supposed to be.

Furthermore, as is well known, the constitution provision referred to is no inhibition upon any legislature in the passage of necessary or reasonable police laws. The Supreme Court of Oregon, in *Stettler v. O'Hara* (69 Ore. 519, 139 Pac. 743, L. R. A. 1917C 914), in upholding a minimum wage law, said: "The Court cannot say, beyond all question, that the act is a plain, palpable invasion of right secured by the fundamental law, and has no real or substantial relation to the protection of public health, the public morals or public welfare. Every argument put forward to sustain the Maximum Hours Laws, or upon which it was established, applies equally in favor of the constitutionality of the Minimum Wage Law as also within the police power of the State, and as a regulation tending to guard the public morals and the public health." Upon the authority of this case, the minimum wage statute of the State of Washington was upheld in *Larsen v. Rice* (100 Wash. 642, 171 Pac. 1037). Subsequently the Washington statute was attacked on the ground that it made no provision for notice to persons affected by its terms. The validity of the statute was sustained (*Spokane Hotel Company v. Younger*, 113 Wash. 359, 194 Pac. 595). In this case the Court in part said: "In short, the legislature, instead of fixing the minimum wage and the conditions of labor for women and minors, as it would clearly have the right to, without any notice whatever to persons affected thereby, has authorized a commission to examine into and determine the facts upon which the act may become operative. This, we are satisfied, may be done without any notice, unless notice is required by the act governing the commission. If the legislature may pass a law fixing the minimum wage

and labor conditions for women and minors, it follows, as a matter of course, that the legislature may authorize the commission to determine the facts upon which such law may become operative. We are of the opinion that employers have no vested right to notice as a matter of right."

The Minnesota Court, in the case of Williams v. Evans (139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L. R. A. 1918F, 542), upholds the validity of a minimum wage law. Likewise the case of State v. Crowe (130 Ark. 272, 197 S. W. 4, L. R. A. 1918A, 567), dealing with a statute of the State of Arkansas.

The Adamson Law in effect fixed a minimum wage for railroad employees, and this law was upheld in Wilson v. New (243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938). This act was sustained primarily upon the ground that it was a regulation of a business charged with a public interest, and it was pointed out that regarding "the private right and private interest, as contradistinguished from the public interest, the power exists between parties, the employers and employees, to agree as to a standard of wages free from legislative interference," but that this did not affect the power to deal with the matter with a view to protect the public right.

NOTES OF IMPORTANT DECISIONS

UNLICENSED PERSON MAY RECOVER FOR SERVICES AS NURSE.—Under Laws 1921, p. 527, amending Rev. St. 1919, § 9160, prohibiting anyone from practicing as a nurse for hire or engaging in the care of the sick as an attendant unless licensed, in view of the fact that section 9162 as amended requires a certificate of facts regarding an applicant's experience and qualifications to practice as an attendant, and section 9166 as amended refers to any nurse or attendant without a certificate, a person who cared for the farm and stock of a sick person could recover for services in caring for such person, although he was unlicensed as a nurse or attendant, since the statute refers to the professional practice of nursing and the word "practice" means fre-

quently repeated or customary action, habitual performance, a succession of acts of similar kind, habit, custom, application of science to the wants of men, the exercise of any profession, professional business, as the practice of law or medicine, and "engage" means to embark in a business; the two words as used being synonymous. Marker v. Cleveland, Mo. App., 252 S. W. 95.

"In all the cases which we have found where convictions for crime have been had for treating the sick, or other similar cases, dispensing medicines without a license, or where recovery for such services have been denied, have been cases where the accused or claimant was *practicing* the profession without having complied with the statute. Examples—see State v. Smith, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179; O'Bannon v. Widick (Mo. App.), 198 S. W. 432; Id., 281 Mo. 478, 220 S. W. 853. It is clear to us that the services rendered by plaintiff in the nature of nursing were not rendered while *practicing* as a nurse, or while *engaging* in the care of the sick as an attendant; but were rendered in connection with other burdensome labor, and that he can recover for such services as well as the others."

PHYSICIAN'S OPINION MUST BE BASED ON SUFFICIENT FACTS.—In the case of Wells Bros. Const. Co. v. Industrial Commission, 137 N. E. 791, the Illinois Supreme Court held that a physician's testimony as to the applicant's physical condition following an injury should have been excluded where he had based his conclusions solely upon observations of outward symptoms, such as twitching of the injured man's hands, and statements made by him. In this respect the Court said:

"We think the argument of counsel for plaintiff in error finds support in the record that considerable of the testimony of the physicians testifying for the applicant was based upon a subjective examination, and it may be said that some of the testimony of the physicians for plaintiff in error was based also on the subjective symptoms as stated to them by the applicant. This Court has more than once held that the testimony of physicians is incompetent which is made after examination of the applicant with a view to testifying and is based wholly upon the physicians' observation of outward manifestations within the applicant's control, such as pressure or twitching of the hands or turning in of the toes (Grienke v. Chicago

City Ry. Co., 234 Ill. 564, 85 N. E. 327; Casey v. Chicago City Ry. Co., 237 Ill. 140, 86 N. E. 606). This Court has also held that, when the physician's statement is based partly upon his own observation and partly upon the statement of the case made by the injured person, such evidence is not admissible (Chicago Union Traction Co. v. Giese, 229 Ill. 260, 82 N. E. 232). Therefore, it is clear that the testimony of Dr. Comes, so far as he testified it was based 'only on his (Lydon's) actions and statements,' was inadmissible. It seems also clear from the reading of Dr. Rydin's testimony that he based his conclusion as to the applicant's condition partly upon the statements of the subjective symptoms made to him by the applicant. What was said by this Court in Schmidt v. Chicago City Railway Co. (239 Ill. 494, 88 N. E. 275), International Coal Co. v. Industrial Comm. (293 Ill. 524, 127 N. E. 703, 10 A. L. R. 1010), McKenna v. Chicago City Railway Co. (296 Ill. 314, 129 N. E. 814), and Central Illinois Service Co. v. Goodpasture (302 Ill. 27, 134 N. E. 124) does not in any way modify the conclusions reached by this Court in the decisions already cited as to the physician not being authorized to base his conclusions as to the person's injury in part upon objective symptoms and in part upon subjective symptoms derived from the patient's statements to the physician."

RAILROAD EMPLOYEE RENEWING TIES ENGAGED IN INTERSTATE COMMERCE.—V., an employee of a railroad company, was engaged in renewing cross-ties upon a main running track over which passed intrastate and interstate traffic. A private road crossed this track at the place V. was working. This crossing was planked. In order to renew the ties, it was necessary to take up the crossing planks and relay them. While driving a spike in the relaying of the planks, the head of the spike broke off, striking V. in the eye and destroying the sight thereof. Held, by the Supreme Court of New Jersey, in Vincelli v. New Jersey Cent. R. Co., 121 Atl. 132, that V. was engaged in interstate commerce at the time of the accident. The Court in part said:

"There is probably no question which has been the subject of more legal discussion and more divergent views than the one as to whether at the time of an accident an employee was or was not engaged in interstate commerce. It is a question often difficult to decide. In the present case we feel constrained to differ with the opinion of the

court of common pleas. The particular work in which Vincelli was engaged was in renewing ties of a main running track used in interstate traffic. The taking up and the relaying of the planking at the private crossing was a part of the main or particular piece of work in which Vincelli was at the time of the accident engaged. Under the General Railroad Act (section 26, P. L. 1903, p. 659), it is made the duty of a railroad company to 'construct and keep in repair good and sufficient bridges and passages over, under and across the railroad or right of way where any public or other road, street or avenue now or hereafter laid, shall cross the same, so that public travel * * * shall not be impeded thereby.' This provision cast upon the railroad company the obligation of maintaining and keeping in repair the crossing. The planking was a part of the crossing and the crossing a part of the track which was an instrumentality used in interstate commerce. When Vincelli was at work in spiking the planks of the crossing, he was in legal contemplation as much engaged in interstate commerce as if spiking a nail to the cross-ties. If he had been injured doing the latter, there would probably have been no question raised as to whether or not he was engaged in interstate commerce at the time of the accident. The determining factor is whether the structure upon which the employee is working is an instrumentality used by the carrier in its interstate business. If subject to such use, then an employee working upon such instrumentality is engaged in interstate commerce."

In Stiedler v. Pennsylvania R. R. Co., 94 N. J. Law, 197, 109 Atl. 512, the employee was painting, when injured, a pole carrying electric wires used to operate cars. The Court of Errors and Appeals said that he was engaged in the preservation of an instrumentality of interstate commerce. One engaged in assisting a railroad surveyor in a survey made to eliminate a curve in a track used by the railroad company in both intrastate and interstate traffic was held to be engaged in interstate commerce.

UNDERTAKER NOT LIABLE FOR NEGLIGENCE OF DRIVER OF HIRED VEHICLE.

—In the case of Courtinard v. Gray Burial & Cremation Co., 121 Atl. 145; the New Jersey Court of Errors and Appeals holds that where an undertaker hired an automobile with a driver from another undertaking company, to go to a named cemetery, and exercised no control over the driver except to state generally

the cemetery objective, leaving to him the exclusive management, itinerary direction, and control of the vehicle, and the services of the driver were not transferred to the hirer, the latter is not responsible for the driver's negligence. We quote a portion of the Court's opinion as follows:

"Tested, therefore, by this principle, it is manifest from the undisputed facts in the record that the defendants Casey neither hired, directed, nor controlled the driver, nor did they exercise over him power, authority, or supervision more than to impart to him, as was done in the Steinbrenner Case, the particular purpose and object of his employment, leaving to him the exclusive management, itinerary direction, and control of the vehicle, which factors, as we have observed, present the substantial inquiries and determinative tests for ascertaining the existence of the legal relationship of master and servant, and consequent liability thereunder. Nor can the factual and legal status of the driver be ignored in dealing with the liability of the parties, for manifestly as a sentient being, capable of choosing his own employment, his services could not be transferred to another without his consent, expressly or impliedly given, and whether such transfer was in fact effectuated would inevitably become a jury question, whenever from the testimony that inquiry would assume the form of a debatable question, for as was stated by Mr. Justice Magie for the Supreme Court in *D. L. & W. R. R. v. Hardy*, 59 N. J. Law, 35, 34 Atl. 986, affirmed by this Court in 59 N. J. Law at page 562, 39 Atl. 637:

"To establish the fact that the servant of one has thus transferred his services to another pro hac vice, it must appear that he has assented expressly or impliedly to such transfer. No one could transfer the services of his servant to another master without the servant's consent."

In this connection, see holding of the St. Louis Court of Appeals in *Grothmann v. Hermann*, 241 S. W. 461, annotated in 95 C. L. J. 307.

FOR ACCURACY'S SAKE

"You have heard what the last witness said," persisted counsel, "and yet your evidence is to the contrary. Am I to infer that you wish to throw doubt on her veracity?"

The polite young man waved a deprecating hand.

"Not at all," he replied. "I merely wish to make it clear what a liar I am if she's speaking the truth."—*Tit-Bits (London)*.

THE JUDICIAL POWER OF THE SUPREME COURT

By EVERETT P. WHEELER

Mr. Tittmann's article (C. L. J., Vol. 96, p. 367) on the subject of limiting the power of the Supreme Court, reminds one of Mr. Cleveland's remark, "The campaign of education is a continual duty."

When the people of the United States framed the Federal Constitution they established a government with certain powers which were defined in a written instrument which we call the Constitution. The people also determined in this same instrument to limit in some respects the powers of the several State Governments. The question naturally arose—how shall these limitations be enforced? The people in their Constitution provided for a Supreme Court of the United States which should have jurisdiction over controversies arising under the Constitution and laws of the United States. Its decisions were to be final.

This proposition that it was not only the right but the duty of the Court to decide whether an act either of Congress or of the state legislatures transcended the authority conferred by the Constitution is clearly stated in the Federalist. In the debate in the Massachusetts Convention Samuel Adams stated it clearly. The objection which has been made to the Constitution as originally proposed was that it contained no bill of rights. Governor Hancock introduced a resolution which favored an amendment which should declare expressly the reservation of certain rights to the people of the States. This reservation was afterwards embodied in the first ten amendments which were unanimously adopted immediately after the ratification of the Federal Constitution. It is clear from contemporary history that this Constitution would not have been ratified had it not been with the understanding that these amendments would be adopted. Mr.

Adams said (Elliot's Debates, Vol. II, p. 131):

"Your Excellency's just proposition is 'that it be explicitly declared that all powers not expressly delegated to Congress are reserved to the several States to be by them exercised.' This appears to my mind to be a summary of a bill of rights which gentlemen are anxious to obtain. It removed a doubt which many have entertained respecting the matter, and gives assurance that if any law made by the Federal Government should be extended beyond the power granted by the proposed Constitution and inconsistent with the Constitution of this State, it would be an error, and adjudged by the court of law to be void."

The love of power is natural to man and the State Governments at an early period showed a disposition to transcend the limits which the people had thus set to their powers and to encroach upon the powers of the general government. Laws were passed taxing the agencies of the general government, taxing commerce between the States, and limiting the rights of citizens of one State to do business in another. Finally, several of the States undertook to tax and regulate immigration into those States from foreign countries. The Courts of the several States in which these acts had been passed sustained their validity. But in every one of the instances mentioned the Supreme Court of the United States in virtue of the power given it by the Constitution overruled the state courts and held the acts of the state legislatures to be in violation of the limits which the people through their Constitution had fixed. It was not the Court, properly speaking, that overruled the acts of the state legislature; but the people themselves through the Constitution which they had made. The Court acted as a tribunal to enforce the sovereign will of the people. The power thus conferred upon the Court was undoubtedly great, but experience has shown that it was vital to the existence of the government.

If the decisions of the state courts and the acts of the state legislatures which have been referred to had been sustained the government of the United States would have been weak and inefficient and would have gone to pieces at the first attack.

From the beginning the Supreme Court has recognized the greatness of the task thus imposed upon it and has held that an act either of Congress or the state legislature should not be declared to be in excess of the powers conferred by the people upon their legislatures except in a clear case. In every decision where the power has been exercised the concurring judges have held that the case was clear. What the dissenting judges said in effect was that to them the repugnancy was not clear. One of the most important of the decisions that has been referred to, that in the Passager tax cases (7 Howard 283), which upheld the right of Congress to control immigration into this country, was by a Court almost equally divided. Five judges concurred in the decision, four dissented. But the people have acquiesced in the soundness of the decision and no one now would think of disputing it. If each State could regulate for itself immigration and allow any persons it chose to enter its domain, this would in effect subvert any restrictions which might be placed by other States. It is clear to us now, though it was not to four learned judges, that this subject is one for the jurisdiction of the federal government.

The radical fallacy in Mr. Tittmann's proposition is this: If it were required that more than a majority of the Court should concur in a decision this would really put the decision in the hands of the minority. Three dissenting judges would really decide the case.

Everyone admits that the quantity of legislation in this country is excessive. Let us be thankful that there are some limits to the powers of the legislatures and that we have a Supreme Court to enforce these limitations.

THE SUPREME COURT AND FIVE-TO-FOUR DECISIONS

By GEORGE E. SLOAN

Senator Borah has announced that he intends to revive his bill limiting the power of the Supreme Court in declaring federal laws unconstitutional. The bill would require at least seven of the nine Justices to concur in nullifying an act of Congress, thus eliminating the criticism of "five-to-four" decisions.

La Follette, leader of the Senate radicals, would go even farther and have a constitutional amendment enabling Congress to override all decisions of the Supreme Court by a two-thirds vote. Borah draws the line at this, saying:

"I do not believe in depriving the Supreme Court of the power to pass upon the constitutionality of law. But there is much dissatisfaction over five-to-four decisions by which acts of Congress, passed by an overwhelming majority and signed by the President, are nullified and if some moderate measure, such as I am proposing, is not adopted we may get something more radical."

The idea is not new. Webster once proposed a similar measure, and Clay supported it. As late as 1868 the House passed such a bill, but it did not get through the Senate.

While it is no doubt true that there is dissatisfaction over the power of the Supreme Court to invalidate acts of Congress by a mere majority vote, it is highly probable that its extent is considerably less than Mr. Borah has been led to believe. Here, for example, is an opinion of the type that has so influenced the Senator from Idaho:

"Not satisfied with usurping the power to nullify acts of Congress, for the lust of power is never satiated, the Supreme Court has arrogated to itself the equally dangerous power of amending the acts which it permits to stand. * * *

If, to a majority of the nine irresponsible individuals who constitute the (Supreme) Court, an act of national legislation does not seem reasonable they may disregard its obvious meaning as explicitly set forth in the act itself and give it a wholly different meaning which will accord with their own personal views. * * * Nine corporation lawyers, most of them by association, training, and predelection wedded to plutoocracy, are actually exercising the power to say what laws the national legislature may enact and to make over to suit their reactionary minds those that they do not declare unconstitutional."

Such views do not come from Magnus Johnson, nor that veteran warrior, Samuel Gompers. These charges of "usurpation," "corporation lawyers," and "irresponsible individuals" come from a Justice of the Supreme Court of New York—John Ford!

Opposed to the view of Justice Ford is that of L. L. Winters, Chicago economist and director of the Chicago Board of Trade, who believes that:

"The Supreme Court is the only safeguard of our lives, liberty and property. Destroy its power and a tyrannical majority would, at will, pass legislation which would destroy the rights of the helpless minority."

James M. Beck, U. S. Solicitor General, takes the stand that we might some day have a radical President and in the four or eight years he was in power he might be able to appoint three Justices of the Supreme Court. Thus a radical faction could be formed within the Court, making it impossible for the Court to properly perform its function for many years to come. Illness or death might result in only six judges sitting, when the unanimous opinion of the six judges present would be nullified by the absence of the others.

The United States is the only nation in existence where the court of last resort is

able to veto the acts of the highest legislative body.¹

While the Constitution itself did not expressly grant the powers of passing upon the constitutionality of federal or state laws,² they were established by repeated decisions of the Court, and sanctioned by public opinion of the nation. The first of these great decisions was that of *Marbury v. Madison*, decided in 1803, soon after Marshall came into office. This held that to declare unconstitutional any act of Congress.

In order to understand the origin of *Marbury v. Madison*³ it is necessary to understand John Marshall. At the time he accepted the position of Chief Justice of the Supreme Court in 1801 it was not the position of honor that it is today. John Jay, the first Chief Justice, resigned to become a candidate for Governor of New York. John Rutledge resigned from the Supreme bench to become Chief Justice of the South Carolina Supreme Court, and President Jefferson himself said in his message to Congress in 1805 that undoubtedly the second office in the United States was governorship of the Territory of Orleans. When the architect of our national capitol planned the structure he forgot that the Supreme Court even existed and did not provide a room for it in the building. This explains why the Supreme Court of the United States, during all the time that

(1) But see 6 Am. Pol. Sci. Rev. 456 (1912), mentioning a recent case in Roumania declaring unconstitutional an act of the Roumanian Parliament.

The Federal Circuit Court for Pennsylvania declared an act of Congress unconstitutional in *Hayburn's Case* (1792), but the case is not reported. See 13 Am. Hist. Rev. 281 (1908), by M. Ferrand.

(2) The subject was not debated extensively in the Constitutional Convention, and what little discussion did take place showed a wide difference of opinion among the delegates.

The Constitution itself says merely that:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office. (Article 3, Section 1.)

(3) 1 Cranch. 137.

Marshall was Chief Justice, met in the basement of the Capitol—the little room which is now the library of the Court.

Marshall's one great thought in going on the bench was to weld the States into a single nation. He did this by strengthening the Supreme Court and the first of those tremendous pronouncements which made the Court more powerful than Congress itself was *Marbury v. Madison*. Since then *Fletcher v. Peck*,⁴ *McCulloch v. Maryland*,⁵ the *Dartmouth College Case*,⁶ *Gibbons v. Ogden*,⁷ and *Cohens v. Virginia*⁸ have followed. It is significant, in view of the recent agitation, that none of these great landmarks were "five-to-four" decisions.⁹

Borah and La Follette seem to concentrate their attack on the Court's power to nullify federal legislation. To be consistent they must also shackle its far more important power of declaring state legislation unconstitutional. Of the total of 50 cases where an act of Congress has been declared unconstitutional, in our hundred and fifty years of history, the number of bare majority decisions has only been a little over half.

The number of decisions holding acts of state legislatures to be unconstitutional numbers under 300, which is surprisingly small when we realize that the number of state law-making bodies has increased from 13 to 48 and that their output has been enormous.¹⁰

During the first eighty years only four federal statutes were held unconstitutional, of which only two were of any im-

(4) 6 Cranch 87 (1810).

(5) 4 Wheat. 316 (1819).

(6) 4 Wheat. 513 (1819).

(7) 9 Wheat. 1 (1824).

(8) 6 Wheat. 264 (1821).

(9) At the time of the first case there were only six judges. When *Fletcher v. Peck* was decided five judges sat, with two sick. The Court consisted of seven judges normally when the other cases were decided, one being absent when *Cohens v. Virginia* was before the Court. It was some time after this that Congress increased the number from seven to nine.

(10) See Congress and the Supreme Court, by Alexander Sidney Lanier, 218 N. Am. Rev. 578.

portance. Even if the Court had been unable to determine the validity of either of these two (the Mandamus act of *Marbury v. Madison* and the Missouri Compromise act of the Dred Scott case), it is probable that history would not have shown any different results. Neither would the course of events have been altered to any great extent had the Court never exercised its powers regarding the 32 acts of Congress held unconstitutional between 1869 and 1917, with the possible exception of the Civil Rights cases.¹¹ Thus it seems fair to say that the fundamental value of *Marbury v. Madison* is in securing uniformity in federal law, which could never result otherwise.

But had the Supreme Court been deprived of its other, and major, power—that of passing upon the constitutionality of state laws—the result might have been very different.¹²

"I do think," says Justice Holmes, "(that) the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views, and how often action is taken that embodies what the commerce clause was meant to end."¹³

Those who would reform "five-to-four" decisions call the power of the Court to declare void acts of Congress "usurpation." This charge is answered once and for all by Professor Beard, who says:

"In view of the principles entertained by the leading members of the convention with whom Marshall was acquainted,¹⁴ in view of the doctrine so

(11) Justice Holmes himself has said that: "The United States would not come to an end if we lost our power to declare an act of Congress void." See Sup. Ct. in U. S. History, by Charles Warren, Vol. 1, pp. 16-17.

(12) Illustrated in 1870 when the Kentucky courts held the Legal Tender Act invalid, while the courts of other states held the contrary.

(13) *Ibid.*, Vol. 1, page 17.

(14) It is only fair to say that not all the members of the convention believed that the Court should be more powerful than Congress. Benjamin

clearly laid down in Number 78 of the Federalist, in view of the arguments made more than once by eminent counsel before the Supreme Court, in view of *Hayburn's Case*,¹⁵ and *Hylton v. United States*,¹⁶ in view of the judicial opinions, several times expressed, in view of the purpose and spirit of the federal constitution, it is difficult to understand the power asserted by Marshall in *Marbury v. Madison* as 'usurpation.'¹⁷

The necessity of jurisdiction by the Court over federal and state legislation was realized by Madison. Speaking in 1832, he said:

"I have never been able to see that, without such a view of the subject, the Constitution itself could be the supreme law of the land; or that the uniformity of the federal authority throughout the parties to it could be preserved; or that, without this uniformity, anarchy and disunion could be prevented."¹⁸

To require seven judges to hold an act void, as advocated by Senator Borah, would relax the protection afforded by the Constitution to that extent, since it might be possible for the illness or willfulness of one member to paralyze the power of the Court to act when necessary. With one justice absent the votes of all but one of the remaining judges would be necessary to invalidate an act contrary to the Constitution. With two judges absent, because of illness or resignation, it would take the entire Supreme Court to hold a congressional act unconstitutional.

If it is necessary that there be any disruption of the Court as now constituted it would seem that the suggestion of Franklin said that when a majority of both Houses had passed an act, and the President had signed it, no man would have the temerity to overthrow it. See Mich. State Bar Journal, Vol. 1, page 121, March, 1922.

(15) Not reported. See 13 Am. Hist. Rev. 281, and *ibid.*

(16) Decided March, 1796; 3 Dall. 171; 1 Law. Ed. 556.

(17) N. Y. Times, Book-Review, March 4, 1923, page 10.

18. *Ibid.*

erick G. Bromberg would be much preferable to that of the gentleman from Idaho. Mr. Bromberg's theory is that the Court may itself pass a by-law requiring the votes of seven members to declare an act of Congress void.¹⁹

It is doubtful in the extreme whether any mere act of Congress regulating the method of conducting its affairs would be accepted by the Supreme Court in view of the unbroken line of authority and successful conflict on the same lines from *Marbury v. Madison* to the present. Granted that it were necessary or desirable to compel seven votes out of nine to pass upon the constitutionality of legislation, such a step would have to be effected by means of a constitutional amendment.

But to destroy to any degree the power or usefulness of that institution which has acted for almost a century and a half as a balance wheel against unwise or hasty legislation is to that same degree to strangle and neutralize our distinctive governing system of checks and balances and vitiate the protection accorded us under our Constitution.

Sensible men, while they realize that Courts are not infallible, know that legislatures are even less so, for reasons inherent in the political condition of their existence. Impatient reformers may rage at any checks upon their projects, but that fundamental force known as "the people" recognizes that in the vast majority of cases the restraints of the Courts has been for their protection. The Supreme Court has survived war, panic and party strife, and it is to be doubted whether that vast, unheard multitude making up the rank and file of our nation will countenance any such handicap upon the Court in the faithful performance of its duties such as would inevitably be the result of the proposed bill by Senator Borah.

(19) Cen. L. Jr., Aug. 20, 1923, Vol. 96, page 285.

WORKMEN'S COMPENSATION—INJURY BY SHOOTING

TEXAS EMPLOYEES' INS. ASS'N v. GILL

252 S. W. 850

Court of Civil Appeals of Texas. (May 9, 1923.)

Where employees drilling an oil well had the right to use a road through a farmhouse yard under an agreement between the employer and the occupant of the premises that he should be a watchman, and one of the men, while returning at night with food supplies, was shot by the watchman while acting in pursuance of his duty to prevent trespassing, held that, even if the watchman acted in a reckless manner, and the employees acted negligently in failing to give signals on entering the premises, the injury was compensable as one having to do and originating with the work within the statutory definition of the term "injury in course of employment" which excludes injury by an act of a third person intended to injure the employee because of reasons personal to him.

Lawther, Pope & Leachman of Dallas, and Taylor, Allen, Muse & Taylor, of Henrietta, for appellant.

Weeks, Morrow & Francis, of Wichita Falls, for appellee.

BOYCE, J. J. H. Gill, an employee of Thomas M. Sessums, a member of the Texas Employers' Insurance Association, brought this suit to recover compensation under the Workmen's Compensation Act (Vernon's Ann Civ. St. Supp. 1918, art. 5246—1 et seq.) for injuries alleged to have been sustained in the course of his employment. This injury was the result of one Salisbury shooting the plaintiff under circumstances hereinafter detailed. The claim was denied by the Industrial Accident Board, and the claimant appealed to the district court of Clay County, where judgment was rendered awarding him the compensation claimed.

The principal question in the case is whether the evidence is sufficient to support a finding that injury was sustained by claimant in the course of his employment. The facts on which this question is to be answered are as follows:

Gill was employed by Sessums as a helper and cook in the work of drilling an oil well. Sessums boarded the men, furnished a shack on the premises, with beds, cooking utensils, etc., for their use. He also furnished the provisions, and it was part of Gill's duties to do the cooking. Gill also attended to ordering the provisions and bringing or having them brought out to the premises. It was the custom for the men to go to Wichita Falls Satur-

day evening after the day's work was over and return to the lease Sunday evening or night, spending the interim in rest and recreation. These trips were made in an automobile belonging to one of the employees. On these visits it was Gill's custom to get the provisions for the ensuing week, and bring them back as the party returned. Entry to the property on which the well was located was had by passing through the yard surrounding a farmhouse located on the premises covered by the oil lease, the road passing through two gates at this yard. This farmhouse was occupied by one Salisbury, probably a tenant on or the owner of the land on which the well was being drilled. Sessums had (according to his testimony) an agreement with Salisbury that Salisbury should "watch the well and keep people out of there at all times, because we did not want any visitors at any time, and after the fellow across the way closed his gate that was the only ingress and egress." One of the witnesses testified that Sessums told him that "these men were on duty, and there had been some objection to them going through the place, and that he had arranged with the men who owned the place and told them these men must go through the place."

On the Saturday evening before Gill was shot he, with three other men, went into Wichita Falls in a car owned and driven by one of his co-workers. On Saturday night after arrival at Wichita Falls he placed an order for groceries which on this occasion were to be brought out by Sessums on Monday morning. On Sunday night the party met by arrangement at a restaurant preparatory to returning to the shack where they were to sleep that night. At this time Gill purchased some bread and milk to take back for use the next morning at breakfast. They left town about 12:00 o'clock, and after they had passed through one of the gates at Salisbury's house, and were about 50 yards from the house were without warning fired upon by Salisbury, the shot taking effect in Gill's back, and injuring him severely. Gill testified that as they were going to town Saturday evening they were accosted by Salisbury; that he (Gill) did not hear the conversation that ensued, but his companions reported to him that Salisbury was mad because of the conduct of some "wild women" who had been at the oil well and had insulted his wife. "The boys told me he was mad because of this treatment he claimed his wife had received at the hands of these women. I didn't hear him say anything about us coming through there. The boys told me he said he wanted us to give

some signal when we came through; that he was not going to allow those women going down there and cutting up." In another part of his testimony he said: "I heard that Mr. Salisbury was mad at us, claiming we had stolen some of his chickens." He also said that he was personally friendly with Salisbury and the evidence is sufficient to show that Gill nor any of the men with him on this occasion had anything to do with the presence of the objectionable women at the oil well.

In one of the affidavits filed by Gill in support of his claim and introduced in evidence by the defendant, Gill makes this statement:

"I can give no reason on earth as to why he (Salisbury) shot at us, except he claims to have shot in the direction of the car for the purpose of stopping the car so he could see who was in the car. I am informed that he was employed by Sessums as a watchman on the lease."

This is about all the evidence in the record that throws any light on the controversy as to the liability of the insurance association. While it is not as satisfactory as it might be, we are of the opinion that it is sufficient to warrant a finding that Salisbury was at the time of the shooting acting in pursuance of his duty, recklessly, it may be, for the purpose of preventing the entry of trespassers on the premises.

The statutory definition of the term "injury sustained in the course of employment" expressly excludes "an injury caused by an act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee, or because of his employment," and expressly includes "all other injuries (not expressly excluded) of every kind and character having to do with and originating in the work * * * of the employment, received by an employee while engaged in or about the furtherance of the affairs * * * of his employer, whether upon the employer's premises or elsewhere." Vernon's Ann. Civ. St. Supp. 1918, art. 5246—82. If we are correct as to the conclusion that may be drawn from the facts as above stated, then the injury sustained in this case does not come within the terms of the exclusion of the statute, just quoted, and we have only to determine whether it is within the inclusive provision.

Gill's right to use the road through Salisbury's yard was derived from his employment, and "any risk arising from such use was incident to the employment." If the injury had been the result of some permanent defect in this way of entry, it would not be doubted that the injury had to do with and originated

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in the work. Lumberman's Reciprocal Association v. Behnken (Tex. Sup.), 246 S. W. 74, citing Honnold, vol. 1, § 122, and other authorities which fully sustain the proposition submitted. If there was a risk incident to the use of the entry, not caused by its condition, but the result of other agencies, whether those agencies were under the control of the master or not, an injury resulting to an employee therefrom would originate in and have to do with the employment. The Behnken Case, *supra*; Kirby Lumber Co. v. Scurlock (Tex. Sup.), 246 S. W. 76. In the Behnken and Scurlock Cases the injury was such a one as might have been reasonably contemplated would result from the use of the railway crossing in the one case and the tram road in the other. In order to proceed further in the case we have for consideration, it remains to be determined what may be the rule as to anticipated injury and the result of its application to the facts of this case. In some of the authorities it is said that there must be a causal connection between the employment and the injury, and that only such injuries are compensable as are "In the light of experience the foreseen result of the employee's engaging in the employment." 28 R. C. L. 786; also pages 796-802. In the case of *In re McNicol*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, injury was inflicted by the assault of a fellow workman who was in the habit of drinking, and who when intoxicated was quarrelsome and dangerous, which fact was known to the employer. Compensation was allowed on the ground that the injury was the natural result of the "employment of a peaceable workman in company with a choleric drunkard." In that case it is said that an injury—

"arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. * * * It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

In the case of *Re Reithel's*, 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A, 304, the super-

intendent of a woolen mill, upon ordering a trespasser to leave the premises, was shot and killed by such person, and compensation was allowed. In the opinion some stress is put on the fact that this particular trespasser had given trouble before, and "liability to whatever personal injury might be likely to arise in dealing with such a person was, therefore, within the contemplation of the employer and employee," and "became a risk of the employment." In this case it was said that the injury, "although unforeseen and the consequence of what on the record appears to have been a crime of the highest magnitude, yet now, after the event, appears to have had its origin in a hazard connected with the employment and to have flowed from that source as a rational consequence."

In the case of *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, a section foreman was assaulted by a laborer whom he had discharged, and compensation was allowed on the conclusion that he "was hurt in an altercation which grew out of his justifiable efforts to maintain his authority as foreman and to protect the property of his employer intrusted to his care."

In the case of *Atolia Mining Co. v. Industrial Commission*, 175 Cal. 691, 167 Pac. 148, a miner returned to the mine after the close of the day's work to make some inspections in the line of his duty, and after coming out was shot without warning by one of the mine guards, and compensation was allowed. It was said in this case that—

"While unquestionably it was a heedless and reckless thing for the guards thus to have shot a man, * * * yet every legal presumption favoring innocence, the argument will not be sustained that these guards deliberately perpetrated an assault to commit murder. To the contrary, it will be held that the man who fired the shot * * * believed that the circumstances justified him in so doing, and that thus he was acting within the line of his own employment, and under this view, Mason (the injured employee), having been injured by the negligent performance of an act within the general scope of the duties of the employee inflicting the injury, is entitled to his recovery."

In this connection it is pertinent to say that disobedience and negligence in the performance of their duties by co-employees are to be anticipated, and are "as much one of the risks of a man's employment as a defect in the mechanical appliances." Honnold, § 120. In the case of the Georgia Casualty Insurance Co. v. McClure (Tex. Civ. App.) 239 S. W. 644, com-

pensation was awarded for injuries sustained by an employee in a fight with another employee, the fight growing out of a quarrel about the work. A writ of error was granted in the case, and, as this prevents the decision from having authoritative weight, we do not discuss it further. The Court of Civil Appeals in the Behnken Case (Tex. Civ. App.), 226 S. W. 154, drew a distinction between the term "injury arising out of and in the course of employment" and that used in our statute, to-wit, "having to do with and originating in the work of the employment," holding that under our statute there need be no direct causal connection between the employment and the injury. However, the Supreme Court, in disposing of the case, did not place the decision on such grounds.

(1) Without attempting to state any test for general application, we think the authorities discussed sustained at least this conclusion: That, since Salisbury was at the time of the shooting acting in the performance of the duties of his employment, then the injury inflicted by him would be compensable, notwithstanding he acted in a reckless manner, and notwithstanding the fact that the employees themselves may have acted negligently in failing to give the signals Salisbury had informed them they should give on entering the premises. We therefore hold that the evidence is sufficient to sustain the finding that the injury had to do with and originated in the work.

As to the other requirement, that the injury be sustained by the employee "while engaged in or about the furtherance of the affairs or business of his employer," we cite the cases of Kirby Lumber Co. v. Scurlock (Tex. Sup.), 246 S. W. 76, Western Indemnity Co. v. Leonard (Tex. Com. App.), 248 S. W. 655, Behnken Case, supra, and Employers' Indemnity Corporation v. Kirkpatrick (Tex. Civ. App.), 214 S. W. 956, as being conclusive against appellant's position on this phase of the case.

(2, 3) The Court submitted a special issue inquiring as to whether Gill's injury was sustained in the course of his employment, and in connection therewith gave a definition of the term "injury sustained in course of employment." This definition is not in the language of the statute, and one proposition presented by appellant complains of error in such definition. We do not approve the practice of the Court in varying the statutory definition, but are of the opinion that the definition given in this case was substantially the same as that of the statute, and overrule this proposition.

The Court, in the same connection, expressly charged the jury in the language of the statute that the term "injury sustained in the course of employment" did not include an injury "caused by the act of a third person," etc. And hence we think there was no error in refusing to submit an issue as to whether Salisbury shot plaintiff because of reasons personal to himself, etc.

(4) The judgment, allowing \$374 for payment of plaintiff's doctor's bills for the first two weeks of the injury, is not sustained by the evidence. The physician who was employed testified that his charges for services during the first two weeks was about \$275, which amount was a reasonable charge. When he came to giving the items of the charges, the aggregate thereof was 262. The judgment will be affirmed on condition of remittitur within 15 days of the sum of \$112; otherwise it will be reversed. The appellee's offer to remit comes too late to entitle him to recover costs of appeal. A. T. & S. F. Ry. Co. v. Boyce (Tex. Civ. App.), 171 S. W. 1096 (2), and authorities there cited.

We think the award of \$280 for hospital fees is sustained by the evidence.

NOTE—Injury by Shooting as Compensable Within the Workmen's Compensation Acts—A head waiter whose duties included the hiring, supervision and control of the employees under him, discharged an employee for refusing to obey his orders. Later in the day the employee returned and shot and killed the head waiter. It was held that the dependents were entitled to receive compensation. Cranney's Case, 232 Mass. 149, 122 N. E. 266.

Deceased, a waiter in a cabaret, was shot when he attempted to interfere in a quarrel between a patron and another waiter. Upon the evidence that the employees were expected to interfere in such quarrels, for the purpose of suppressing them, and that this particular cabaret was of a type where such brawls were likely to occur, the Court held that the deceased was acting within the course of his employment and that the injury resulting in death arose out of the employment, entitling his dependents to compensation. Stevens v. Commission, 179 Cal. 592, 178 Pac. 296.

A boiler worker's helper quit and the boiler worker applied to the foreman for another assistant. This angered the first helper, who in an ensuing quarrel shot the boiler worker. It was held that the accident arose out of the employment, justifying the payment of compensation. That such is an unusual and extraordinary result makes it none the less an incident of the employment. Chicago, R. I. & P. R. Co. v. Commission, 288 Ill. 126, 123 N. E. 278.

The collector for a brewery, who was shot and killed by robbers while he was on his rounds of collection, was held to be within the

compensation statute of New York. *Spang v. Broadway Brewing & Malting Co.*, 182 App. Div. 443, 169 N. Y. Supp. 574.

The deceased was employed to check up ice shortages on drivers and to report such shortages to the bookkeeper. Having reported one driver as short, an altercation followed and deceased was shot while seated at his desk, by the employee whom he had reported. An award in favor of the claimant was sustained. *Polar Ice & Fuel Co. v. Mulray*, Ind. App., 119 N. E. 149.

In the case of *Schmoll v. Weisbrod & Hess Brewing Co.*, 89 N. J. L. 150, 97 Atl. 723, it was held that where a delivery man and collector for a brewery was shot by one while making a delivery, there could be no compensation, as the assailant and his motive for shooting were unknown.

BOOK REVIEWS

LABOR SUPPLY AND REGULATION

A copy of the work as above entitled has come to hand from the Oxford University Press, American Branch, New York. It is by Mr. Humbert Wolfe, and is one of the works of the Carnegie Endowment for International Peace. The book contains something over four hundred pages, is well constructed, and is bound in cloth.

It was sought to make the book impersonal and uncontroversial. Attempt was made to leave the plain facts to speak for themselves, and to arrange them without bias, and without imposing upon them any preconceived point of view. It will be interesting to quote the first paragraph of the Editor's Preface, which is as follows:

"In the autumn of 1914, when the scientific study of the effects of war upon modern life passed suddenly from theory to history, the Division of Economics and History of the Carnegie Endowment for International Peace proposed to adjust the program of its researches to the new and altered problems which the war presented. The existing program which had been prepared as the result of a conference of economists held at Berne in 1911, and which dealt with the facts then at hand, had just begun to show the quality of its contributions; but for many reasons it could no longer be followed out. A plan was therefore drawn up at the request of the Director of the Division, in which it was proposed by means of an historical survey, to attempt to measure the economic cost of the war and the displacement which it was causing in the processes of civilization. Such

an 'Economic and Social History of the World War,' it was felt, if undertaken by men of judicial temper and adequate training, might ultimately, by reason of its scientific obligations to truth, furnish data for the forming of sound public opinion, and thus contribute fundamentally toward the aims of an institution dedicated to the cause of international peace."

Upon the termination of the war the Endowment once more took up the original plan, and it was found with but slight modification to be applicable to the situation. Work was begun in the summer and autumn of 1919, and this book is the result of such work.

KEEZER ON MARRIAGE AND DIVORCE

We are in receipt of a copy of the second edition of this work, the full title of which is *A Treatise on the Law of Marriage and Divorce, with synopses of the marriage and divorce statutes of all states and containing complete forms for all purposes*. The original work was by Mr. Frank H. Keezer. This edition was revised and enlarged by the Editorial Staff of The Bobbs-Merrill Company, of Indianapolis, the publishers.

The purpose of the work is stated to be, "To present in a concise manner how marriage, the most important institution of human society, may be legally entered into and dissolved, stating the law of the different states and citing the most important decisions of the courts." In the present edition there are included and developed many matters either not touched upon in the original edition or at most only adverted to. Among the subjects of this character are the promise of marriage and its breach; alienation of the affections of one of the parties to the marriage; the annulment of marriage contracted in violation of law and good morals without resort to divorce, and separate maintenance. The portion of the book devoted to forms has been greatly expanded and made more serviceable. The entire body of the work has been revised and very largely rewritten and its order changed to present a logical and orderly treatment of the marital relation from the time of its inception to its close by complete dissolution through decree of divorce. The book contains a total of more than eleven hundred pages, and is divided into fifty-one chapters, containing in all eleven hundred and seventeen sections. It is well printed on excellent paper and bound in buckram.

CORRESPONDENCE

October 27, 1923.

Editor, Central Law Journal, St. Louis, Mo.:

Dear Sir:

In the Central Law Journal of the 20th inst. No. 20, on page 350, is an editorial on the "Burden of Proof of an Issue of Want of Consideration under the Negotiable Instruments Law." On account of my connection with the origin of that law in this country, I was deeply interested in it.

On page 354, the writer says: "It would seem apparent that the draftsmen of the act must have intended to place both of these defenses in the same class, so far as the burden of proof was concerned, and declare the law accordingly, by the language of Section 28."

On the same page further down, he says: "It must be conclusively presumed that the committee drafting the act, and the several legislatures adopting it, had these conditions in mind."

It seems to me that all doubt and conflict would be removed if Courts would bear in mind the origin of the law and recognize that they ought, in every event, to go back to the decisions of the English Courts on the same questions arising under the law, because the purpose of the act was to render the law in the United States that of England in the matter of Negotiable Instrument.

I will give you a brief reference to that history in confirmation of what I say.

On September 23, 1905, Judge Amasa M. Eaton, President of the Conference of Commissioners on Uniform State Laws in an address delivered before the State Bar Association of Missouri, at St. Louis, on page 4, gives the history of the origin of the Negotiable Instrument Law as adopted by the Conference of Commissioners on Uniform Laws. He says:

"In 1886 the Committee on Correspondence of the State Bar Association of Alabama sent out a circular to the secretary of every State Bar Association and of the American Bar Association, dwelling especially upon the desirability of uniformity in legislation concerning negotiable instruments, calling attention to the English Bills of Exchange

Act, suggesting that it be recommended for adoption to the legislatures of the respective States."

I have no doubt that you have that address in your Law Library in St. Louis.

In January, 1917, in the magazine, "Case and Comment," published by the Lawyers Co-Operative Publishing Co., Rochester, New York, the Hon. W. O. Hart, of Louisiana, on page 646, in an article on the movement for Uniform State Laws, on page 248, says:

"The greatest work of the conference was the preparation and submission to the States in 1896, of the Negotiable Instruments Law."

He goes on to refer to a letter which the Committee on Correspondence of the Alabama State Bar Association, on August 20, 1886, addressed to the secretary of every Bar Association in the United States, suggesting the preparation and adoption in all the States of a uniform law on this important subject, based upon the English Bills of Exchange Act, which had been adopted in 1882, and this letter may be considered as the beginning of the work of uniform legislation in the United States.

Not to extend this communication unreasonably, I will close by referring you to the article in the English Law Quarterly Review which called my attention to the fact that the law of England on the subject of Negotiable Instruments had been codified in 1882, and up to the year 1886, had proved to be so perfect a codification that only one or two cases had arisen under it, requiring construction by the courts. In support of this statement, I refer to the second volume of the Law Quarterly Review, edited by Sir Frederick Pollock, published in London in 1886. On page 125 is an interesting historical article, entitled "An Experiment in Codification," by M. D. Chalmers, a member of the English Judiciary at the time of writing. I think a perusal of that article will convince every lawyer and every judge that when there are any doubts arising as to the proper construction to be given to any portion of our Negotiable Instrument Law, reference should be first had to the decisions of the English Courts in construing the Bills of Exchange Act of 1882, so, in solving the difficulty, in order to keep our Negotiable Instrument Law uniform, not only in the States of this Union, but also uniform with the decisions of England, Canada, and in other parts of the British Empire.

Yours very truly,

FREDERICK G. BROMBERG.

DIGEST.

Digest of Important Opinions of the State Courts
of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Automobiles—Agency.**—Defendant owned and kept upon his premises an automobile for business purposes, and also for the comfort and pleasure of the members of his family, and a minor son was authorized and permitted to operate and use it at any time. While the son was using the car for a specific purpose, with defendant's express permission, his negligent and careless operation thereof caused injury to plaintiff. It is held: (a) That, although using the car for his own personal pleasure, the son was acting within the scope of his authority, and defendant is liable for his negligence in operating the same. (b) The evidence supports the verdict in finding the son guilty of negligence, and in exonerating the plaintiff from the charge of contributory negligence.—Dillingham v. Teeter, Okla., 216 Pac. 463.

2. **Drivers.**—Where plaintiff, whose 14-year-old daughter was driving his automobile, placed his hands on the steering wheel, while the daughter remained in control of the clutch, brake and gas, and on overtaking defendant's automobile defendant turned to the right on plaintiff's sounding the horn, as required by General Highway Traffic Law, § 12, subd. 8, but as plaintiff was passing defendant turned to the left and came in contact with plaintiff's car, which struck a tree and overturned, held that, under Highway Law, § 282, subd. 2, it was not unlawful for plaintiff to permit his daughter to drive the car when he was with her, and it could not be said, as a matter of law, that plaintiff was guilty of contributory negligence, because the daughter was in control of the brakes, clutch, and gas while plaintiff took the wheel, but it was for the jury to determine.—Dunston v. Greenberger, N. Y., 200 N. Y. S. 426.

3. **Garage Keeper.**—If the turning over by defendant's employee of defendant's car to a garage keeper's employee, to be returned to the garage, was not an accommodation in furtherance of defendant's business, but in pursuance of defendant's agreement with the garage keeper to include this act of driving as a part of the general charge inclusive of the storage, then the driving was the act of the garage keeper's servant, and not that of defendant's servant.—Ryciak v. New York Oversea Co., N. Y., 200 N. Y. S. 379.

4. **Passengers.**—Where defendant's automobile was going about 55 miles an hour as it approached the top of a hill, and for 8 miles had been running from 40 to 55 miles an hour without protest on the part of the plaintiff, who was riding by invitation and was injured by the overturning of the car as it passed down the hill at an increased speed after the brakes failed to work, held that, even if defendant was negligent, plaintiff was guilty of contributory negligence, precluding recovery.—Joyce v. Brockett, N. Y., 200 N. Y. S. 394.

5. **Passengers.**—One hired to drive truck in delivering freight had no implied authority to transport guests, and guest could not recover from the employer for his negligence.—O'Leary v. Fash, Mass., 140 N. E. 282.

6. **Signals.**—Burns' Ann. St. Supp. 1921, § 10476u, providing that no driver shall stop suddenly, slow down, or attempt to turn around without first signaling his intentions, applies to backing the car preparatory to turning, and plaintiff, injured by such backing, was entitled to an instruction to that effect; the statute being a police regulation to promote safety, and not of the class of penal statutes which are strictly construed.—Doering v. Walters, Ind., 140 N. E. 74.

7. **Assault and Battery—Intent.**—Where overt act was accompanied by threat to do violence in case a condition specified is not complied with, such act was not an "assault," if there was no present purpose to do harm, and circumstances were such that person threatened must have known no present assault was intended.—Ross v. Michael, Mass., 140 N. E. 292.

8. **Bankruptcy—Assignment for Creditors.**—Where bankrupt, before filing of the petition against it, had made an assignment for the benefit of creditors the court of bankruptcy is without power by summary order to require the assignees to pay to the trustee the amount of a bank deposit which the bank had previously applied on an indebtedness from bankrupt to it, and of which the assignees have neither possession nor control.—In re Geo. W. Cowen Co., U. S. C. C. A., 289 Fed. 192.

9. **Claim Proceedings.**—Summary proceeding before the referee was not the proper mode of procedure for trustee in bankruptcy to assert claims against a creditor of the bankrupt for an item claimed by the creditor to have been settled in accounting between him and the bankrupt, or for an item which trustee claimed should have been credited to the bankrupt for the use of his property, but such claims could only be determined in a plenary proceeding.—In re McKinney, U. S. C. C. A., 289 Fed. 242.

10. **Pledged Securities.**—On bankruptcy of a broker, who, without express authority, has pledged securities deposited with him by customers, some to secure indebtedness, and some not, those customers who were indebted, but whose securities were pledged for more than their indebtedness as to the excess are in the same class as customers owning pledged securities who were not indebted.—In re Archer, Harvey & Co., U. S. D. C., 289 Fed. 267.

11. **Royalty Payments.**—An unrecorded mining lease was not void as to creditors and purchasers, under Code W. Va. c. 74, § 3 (sec. 3831), and payment of royalties made within the four months of bankruptcy and with knowledge on the part of lessor of lessee's insolvency is not recoverable by the trustee for the benefit of the estate; such statute applying only to lien or judgment creditors.—Woods v. Stemple, U. S. C. C. A., 289 Fed. 239.

12. **Trustee Claims.**—Where bankrupt shoe company had agreed with seller of leather to it that, in consideration of seller's extension of credit, it would pay him either in shoes or accounts of its customers, and gave such creditor a power of attorney to collect its accounts with customers, the agreement did not transfer the title to the accounts to the creditor, nor was his power of attorney a power coupled with an interest, but was revoked by operation of law by the filing of the bankruptcy petition; hence where the creditor, by virtue of the power of attorney, collected accounts

due the bankrupt after the filing of the bankruptcy petition, his claim to the proceeds of such collection was colorable, and the trustee of the bankrupt was entitled to reclaim from the creditor by summary proceeding in the bankruptcy court to compel the creditor to turn over such proceeds.—*In re Columbia Shoe Co.*, U. S. C. C. A., 289 Fed. 465.

18.—**Unincorporated Associations.**—The executive committee of the Tidewater Coal Exchange, an unincorporated association, on failure of members to make good their overdrafts of coal, and in order to effect liquidation between its debtor and creditor members on closing its business, held to have authority, after due notice, to commute the liability of debtor members for coal withdrawn to a money liability at the then market price, and the trustee in bankruptcy of the association held entitled, after demand, to enforce such liability.—*Coyle v. Morrisdale Coal Co.*, U. S. C. C. A., 289 Fed. 425.

14. **Banks and Banking—Absolute Purchaser.**—Where an order bill of lading, with draft attached properly indorsed, was accepted, as a deposit, the bank became an absolute purchaser, and, under Personal Property Law, §§ 218, 224, acquired title to the property, unless it took with notice of some infirmity.—*Commercial Sav. Bank v. Mann*, N. Y., 200 N. Y. S. 587.

15.—**Charged With Notice.**—The addition of the word "Executor," or its abbreviation, "Exr.", to the name of the payee of a check, draft or note, is enough to charge a bank receiving the proceeds of such instrument with notice that such funds belong to some estate of which the payee was trustee, and that such funds were not his private moneys.—*Hall v. Windsor Savings Bank*, Vt., 131 Atl. 582.

16.—**Drawee of Checks.**—A promise by the drawee of a check to accept and pay the same does not make the drawee liable in an action by a holder, unless such holder has taken the check with knowledge of the promise of the drawee and on the faith of such promise.—*Citizens' Bank v. Mabrey*, Okla., 215 Pac. 1067.

17.—**Letter of Credit.**—A letter of credit, issued by a bank at the request of the buyer, authorizing the seller to draw drafts thereon, is entirely distinct from the contract of sale, and remains unaffected by any transaction between buyer and seller, or by the fact that the drafts and shipping documents were forgeries.—*Brown v. C. Rosenstein Co.*, N. Y., 200 N. Y. S. 491.

18.—**Secured Deposits.**—While a bank deposit secured by the state guaranty fund remains secured until paid by the bank, payment need not be made in money, any form of settlement with holder of a check thereon which releases the drawer of the check, being a payment which extinguishes the deposit to such extent.—*Hall v. First Nat. Bank*, Tex., 252 S. W. 828.

19.—**Sight Drafts.**—Since, under Negotiable Instruments Act May 16, 1901, §§ 136, 137 (P. L. 194; Pa. St. 1920, §§ 16128, 16129), a sight draft is deemed accepted unless dishonored within 24 hours, a bank not acting with the utmost promptness, diligence, and good faith on receiving negotiable bonds forwarded to it by another bank, as the owners' collecting agent, with a sight draft drawn on such receiving bank as purchaser of the bonds, and failing to give immediate notice of the subsequent theft of the bonds, held liable for the entire loss, though it did not authorize the purchase.—*Fidelity Title & Trust Co. v. First Nat. Bank*, Pa., 121 Atl. 505.

20.—**Transfer of Assets.**—Where, at expiration of charter of a national bank, the directors thereof transferred its assets, good will, and bank building to a new national bank organized by them, pursuant to a plan or scheme kept secret from plaintiffs, minority stockholders, paying full value for all assets, except the bank building and lot and the good will, the bank building being undervalued, and nothing at all paid for good will, held in plaintiff's suit against the new bank and the directors of the old bank, that defendants would be compelled to pay full value for both these items to the stock-

holders pro rata of the old bank.—*Kaufman v. Marquette Nat. Bank*, U. S. D. C., 289 Fed. 295.

21. **Bills and Notes—Negotiable Characteristics.**—A promissory note in other respects negotiable does not lose its negotiable character by reason of a recital therein of its "having been given to [the payee] as per contract for" certain property described.—*State Banking Co. v. Morgan*, Ga., 118 S. E. 415.

22. **Carriers of Passengers—Bus Line Charter.**—To authorize the Commerce Commission to grant a bus company authority to operate its lines and to serve the same public already served by an existing street railroad system, it must appear that the street railroad company was not rendering adequate and convenient service, and that the operation of the bus lines would eliminate such inadequacy and inconvenience; the convenience and necessity of the public being a primary consideration.—*West Suburban Transp. Co. v. Chicago & W. T. Ry. Co.*, Ill., 140 N. E. 56.

23.—**Land Safe.**—It is not the duty of a conductor or motorman to warn passengers, upon leaving a street car at a regular stop, of the danger of automobile traffic in a city street, and failure to caution such passenger of approaching automobiles will not render the company liable for injuries caused by an automobile passing the car at an excessive rate of speed, and striking the passenger after he had alighted from the street car in safety.—*Reining v. Northern Ohio Traction & Light Co.*, Ohio, 140 N. E. 84.

24. **Commerce—Demurrage.**—Under the rule established by the Interstate Commerce Commission, demurrage charges for the detention of cars must be exacted and collected by the carrier in accordance with the tariffs on file, and where certain exceptions or exemptions are specified therein, no others can be permitted. The validity of such rule as demurrage charges upon interstate traffic, adopted and applied by the Interstate Commerce Commission, is not open to question in state courts. *Swift & Co. v. Hocking Valley Ry. Co.*, 98 Ohio St. 143, 112 N. E. 212, L. R. A. 1917E, 916, approved and followed.—*Anthony Carlin Co. v. Hines*, Ohio, 140 N. E. 99.

25.—**Fuel Administration.**—The Fuel Administration Law, so far as it applies to deliveries by dealers after coal had arrived in their yards and was in their possession, related solely to intrastate commerce, and was not an interference with interstate Commerce or in conflict with the federal Fuel Law.—*People v. Moynihan*, N. Y., 200 N. Y. S. 434.

26.—**Railroad Ticket.**—A passenger on an electric railroad car, who had a ticket from Annapolis to Washington, was an Interstate passenger, though the car on which he was riding was destined only to Baltimore, and he would have to change to a Washington car at a junction point.—*Washington, B. & A. Electric R. Co. v. Waller*, U. S. C. C. A., 289 Fed. 598.

27.—**Withdrawal From Commerce.**—A machinist injured while working on a railroad engine withdrawn from commerce by being placed in the shop for repairs consuming two months' time was not engaged in interstate commerce, and hence was not within the federal Employees' Liability Act (U. S. Comp. St. §§ 8657-8665).—*Chesapeake & O. Ry. Co. v. Mizelle*, Va., 118 S. E. 241.

28.—**Yardmen.**—Railroad workman employed in yard of interstate carrier in pulling up old ties and putting in new ones was employed in "interstate commerce."—*Pallucco v. Lehigh Valley R. Co.*, N. Y., 140 N. E. 212.

29. **Constitutional Law—Appeal Bonds.**—Practice Act, § 123, providing for appeals from interlocutory orders appointing a receiver, held not unconstitutional as giving judicial powers to the clerk of court, in that it authorized him to fix and approve appeal bonds; such power being ministerial.—*Bagnolas v. Liberty Land & Investment Co.*, Ill., 140 N. E. 49.

30.—**Contraband Property.**—Equity has no jurisdiction as incident to the protection of the property to enjoin the arrest of the owner or the seizure of his property, with or without warrant, em-

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ployed by him as a gambling device in violation of section 1 of chapter 151 of the Code (Code 1913, § 5440). Such seizure of the property is a proceeding in rem, and being contraband, the provisions of the Constitution relating to trial by jury and depriving one of his liberty or property without due process of law are inapplicable.—Cambria v. Bachmann, W. Va., 118 S. E. 336.

31.—**Corporation Employees.**—Chapter 219, Laws 1911 (Gen. St. 1915, §§ 5880, 5881), which provides when wages shall be paid by corporations to persons leaving their employ and which prescribes penalties which are essentially exemplary damages for failure of any corporation to pay its employees within 10 days after the termination of their employment, does not violate any provision of the federal Constitution, and an employee discharged without payment of his wages within 10 days may have a cause of action under such act.—Livingston v. Susquehanna Oil Co., Kan., 216 Pac. 296.

32.—**Right of Property.**—Under the facts presented, where the action and controversy involved the res, or right of property, it was error for the court, on application of the plaintiff and before trial on the merits, to order the seizure and sale of such property by provisional orders, where such seizure and sale would render ineffectual a judgment thereafter obtained after trial.—Columbus Packing Co. v. State, Ohio, 140 N. E. 376.

33. **Contracts—Jurisdiction.**—A stipulation by parties to an action as to the place of trial has no force or effect, unless the trial court sees fit to make an order changing the place of trial in accordance with such stipulation.—General Motors Acceptance Corporation v. Codiga, Calif., 216 Pac. 333.

34. **Corporations—Liability For Debts.**—The general rule is that, in order to render a purchasing corporation personally liable for the debts of the selling corporation, it must appear that: (a) There be an agreement to assume such debts; (b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation or merger of the two corporations; or (c) that the purchasing corporation was a mere continuation of the selling corporation; or (d) that the transaction was fraudulent in fact.—Spring Creek Oil Corporation v. Dillman, Okla., 215 Pac. 1053.

35.—**Public Utility.**—The mere fact that a corporation sells its entire product upon contract to public utilities, who in turn sell that product to consumers, does not make such corporation a public utility within the definition of section 614—2, General Code.—Ohio Mining Co. v. Public Utilities Commission, Ohio, 140 N. E. 143.

36.—**Sale of Stock.**—A corporation cannot avoid paying commissions for sales of its stock, of which it had accepted the benefits, on the plea that before such sales were made it had disposed of all of its stock to another company.—Colorado Life Co. v. Madden, Colo., 216 Pac. 551.

37.—**Service of Process.**—Where a foreign corporation, manufacturing an article sold largely through the central market in New York City, paid the rent of a New York office having its name on the door, such office being regarded by the trade as its local office, and the person in charge being regarded as its chief representative, who, with other salesmen, did a large volume of business for it, it was doing business within the state, within the statute authorizing service of process on a managing agent.—Heer & Co. v. Rose Bros. Co., N. Y., 200 N. Y. S. 397.

38.—**Stock Investments.**—Where investment by corporation of proceeds of original stock issue in stock of insurance company organized by it occurred prior to acquisition of stock by plaintiffs, they have no right to complain.—Winter v. Southern Securities Co., Ga., 118 S. E. 214.

39.—**Subscriptions.**—Where a corporation sent to a stockholder a subscription form reciting that he was entitled to subscribe for a stated number of shares of the increased capital stock at a named price on payment of 10 per cent in cash, and he signed the subscription, but without filling in the

number of shares, and sent it in with a payment of 10 per cent on the full number, it constituted a definite contract of subscription for such number of shares.—Smith v. General Motors Corporation, U. S. C. C. A., 289 Fed. 205.

40. **Covenants—Restrictions.**—A restriction, covering certain land sold, that no building, "except for cottage residence purposes," should be erected, held not to prohibit the erection of a two-family house; a "cottage" being a dwelling house and not limited to a structure for the use of only one family.—Jones v. Mulligan, N. J., 121 Atl. 608.

41. **Electricity—Classification.**—A classification approved by the Public Utilities Commission, which embraces in one class consumers guaranteeing a minimum demand of 500 kilowatts for combined electric railway and commercial uses, which has application to interurban companies procuring current from a power company at or beyond the limits of the city within which the power plant is located, and in another class electric railways guaranteeing a minimum demand of 20,000 kilowatts for electric railway purposes only, and which demand is constant and steady, such service being in said city and within a relatively short transmission distance, is a lawful and reasonable classification.—Cleveland & Eastern Traction Co. v. Public Utilities Com'n, Ohio, 140 N. E. 139.

42. **Eminent Domain—Building Restrictions.**—A city ordinance providing for a building line 30 feet from the street, and prohibiting buildings other than for residential purposes, which provides compensation for any person damaged by such restrictions, held constitutional, as being an enactment for the interest of the health, safety, morality, general enjoyment, and education of the community, and not in contravention of Const. art. 2, §§ 20, 21, as a taking of property for private use, or taking of property for public use without just compensation.—In re Kansas City Ordinance No. 39946, Mo., 252 S. W. 405.

43. **Frauds, Statute of—Oral Promise.**—A promise to reimburse oil drillers for freight charges paid on tools, if shipped within 12 days, received promptly on the location and kept working for promisor exclusively until eight wells were completed, held enforceable after termination of promisees' employment, notwithstanding the insufficiency of a letter containing it as a memorandum of a prior oral agreement to employ them for at least two years.—Foley & Whitehill v. Texas Co., Tex., 252 S. W. 566.

44. **Innkeepers—Guest.**—Mere guest of registered occupant of hotel room sharing it with the occupant without knowledge or consent of hotel management is not guest of the hotel, as there is no contractual relation.—Moody v. Kenny, La., 97 So. 21.

45. **Insurance—Appraisers.**—An appraiser's award fixing the sound value of an insured automobile immediately before it was damaged by fire at \$2,325, and the damage at \$2,225 ("company to pay \$2,225 and to have salvage"), held not invalidated by such parenthetical clause.—Hexter v. Equitable Fire & Marine Ins. Co., Me., 121 Atl. 555.

46.—**Premium.**—Where an insurance company retained money for a premium, it could not deny liability on the policy issued by its agent.—Ignacio v. Fire Ass'n of Philadelphia, N. J., 121 Atl. 456.

47.—**Waiver.**—Actual knowledge of an insurance agent when the policy was delivered, and while it was in force before a loss, that another than insured owned an interest in the goods insured, waived the policy condition as to sole ownership.—Springfield Fire & Marine Ins. Co. v. Davis, Tex., 252 S. W. 862.

48. **Joint-Stock Companies and Business Trusts—Managers.**—The managers of a joint-stock company are the shareholders' agents, while the managers of a business trust are principals and the shareholders cestui que trustent.—Betts v. Hackathorn, Ark., 252 S. W. 603.

49. **Libel and Slander—Privileged Comment.**—Where plaintiff, a teacher and writer of law, had been dismissed from the faculty of the university

after some discord between him and the president of the university, a letter written by defendants, members of the law faculty of such university, in reply to a newspaper article in which plaintiff's version of the controversy was presented, which letter, signed by defendants, expressed their view that plaintiff's dismissal was based on good grounds that his usefulness as a member of the faculty had ceased, and that in defendants' opinion he was not fit to continue his association with the school of law, was privileged comment as a communication justified by the defendants' interest in the matter.—*Clark v. McElaine*, Mo., 252 S. W. 428.

50. **Master and Servant—Agency.**—A daughter, driving her father's automobile for her mother's pleasure, may be regarded as so carrying out his purpose in maintaining the car as to be his agent, and make him liable for negligence.—*McCrosen v. Moorhead*, N. Y., 200 N. Y. S. 581.

51.—**Assumed Liability.**—Where plaintiff, local manager of a branch tea company store, slipped on the floor of the store, which he had oiled, while carrying a 60 or 70 pound box of canned goods, and it did not appear that the accident would not have happened if a truck had been furnished for him, the employer, the tea company, was not liable. *Narregang v. Great Atlantic & Pacific Tea Co.*, Mich., 194 N. W. 410.

52.—**Extra Compensation.**—Where the relationship of master and servant already exists, the performance of unusual services by the servant at the request of the master does not justify an inference of an agreement to pay extra compensation for those services, but the servant, before he can recover extra compensation, must prove the services were of such character and rendered under such circumstances as would lead to the conclusion that parties were reasonably justified in believing that additional compensation would be paid and expected.—*Pittsburgh, C. C. & St. L. Ry. Co. v. Marable*, Ind., 140 N. E. 443.

53.—**Induced By Passenger.**—The presumption that the driver of a taxicab was acting within the scope of his employment was overcome by undisputed evidence that the trip outside the city limits during which the passenger was injured was beyond the known orders of the driver, and was induced by the passenger over the driver's objections, and should not have been submitted to the jury.—*Blue Bar Taxicab & Transfer Co. v. Hudspeth*, Ariz., 216 Pac. 246.

54.—**Ordinary Duties.**—The word "ordinary" as used in Rev. St. 1909, § 7828, providing that shafting, when so placed as to be dangerous to persons while engaged in their ordinary duties, shall be safely guarded, means according to the established order; methodical; settled; regular; common; customary; usual; and a duty may be ordinary, though it does not continuously occupy the employee.—*Albrecht v. Shultz Belting Co.*, Mo., 252 S. W. 400.

55. **Negligence—Invitee.**—Where plaintiff, a customer in defendant's store, was injured when her foot slipped on the worn part of a marble slab in the floor of the landing of a stairway, the nose of the slab being worn down eleven-sixteenths of an inch, making a gradual and slight slanting of the surface, and it was not shown that there had ever been an accident on the stairway before, the defendant was not liable.—*Tryon v. Chalmers*, N. Y., 200 N. Y. S. 362.

56. **Nuisance—Neighborhood Property.**—The carrying on of a trade or business which creates distressing noises or vibrations, rendering the occupation of property in the vicinity unsafe and uncomfortable, is a nuisance.—*Cunningham v. Wilmington Ice Mfg. Co.*, Dela., 121 Atl. 654.

57. **Parent and Child—Auto Driver.**—In such case the liability of the owner would not rest upon ownership or agency, but upon the combined negligence of the owner and driver; negligence of the father in intrusting the machine to an incompetent driver, and negligence of the son in its operation.—*Elliott v. Harding*, Ohio, 140 N. E. 338.

58. **Principal and Surety—Release of Surety.**—Under section 2698, Hemingway's Code, mere forbearance or indulgence will not release a surety, but an agreement to extend the time of payment which will release a surety must be a positive, binding agreement, supported by a new and valuable consideration, and, in order to effect his release thereby, the burden is on the surety to show a binding agreement based upon some new and valuable consideration, which is sufficient to preclude the creditor from enforcing the instrument during the period covered by the extension.—*Graham v. Pepple*, Miss., 97 So. 180.

59. **Railroads—Motorman.**—An instruction to find for defendant if the motorman looked back before he started to back his car and did not see plaintiff in a place of danger was erroneous, where the evidence showed it was so dark the motorman could not have seen plaintiff 1'ind the car, in which case it was his duty to give warning before he reversed.—*Ulrich v. Grand View R. Co.*, Mo., 252 S. W. 377.

60. **Sales—Delivery.**—Where automobile dealer, whose place of business was at Boston and whose contracts bore the heading of Boston, entered into a contract to sell a truck to one whose place of business was in Providence, which contract provided that the sale was to be "f. o. b. N.—, Mass. Delivery to be made on or about February 22d," held that the place of delivery was in Boston, for, in the absence of any contract provision as to place of delivery, it is at the place of business of the seller.—*Lee v. Northway Motor Sales Co.*, R. I., 121 Atl. 425.

61.—**Representations.**—Where one is engaged in the manufacture and sale of motor trucks, and the rebuilding of its used trucks, newspaper ads or circulars touching rebuilt trucks, authorized and published by such motor company to the general trade, are competent evidence in behalf of the purchaser of any such truck, who knows of such ad and relies upon the same, unless it appear from the special contract signed by the parties touching such sale that such special contract withdrew or altered the representations made in such general ad.—*Meyer v. Packard Cleveland Motor Co.*, Ohio, 140 N. E. 118.

62.—**Quantity.**—An unqualified acceptance of an offer for about 700 barrels of whisky is not complied with by a delivery of 284 barrels.—*C. W. Craig & Co. v. Thomas S. Jones & Co.*, Ky., 252 S. W. 574.

63. **Trusts—Delayed Enforcement.**—Delay by the beneficiary in demanding performance of an express trust, under the terms of which the owner of large holdings of mining stock agreed to carry 10,000 shares for plaintiff's benefit at the price for which the same were purchased, held no objection to the enforcement of the trust after the death of the trustee, where the right of plaintiff to the enforcement of the trust during the trustee's lifetime was clear; such delay not having in any way prejudiced the trustee or his estate.—*Rollestone v. National Bank of Commerce*, Mo., 252 S. W. 394.

64. **Workmen's Compensation Act—Award of Compensation.**—When it develops that claimant was to have a permanently paralyzed arm and a permanently stiff leg with no hope of their recovery or of alleviating that condition, he was entitled to an order for their loss in combined weeks, under Workmen's Compensation Act, § 306, par. (c), being Pa. St. 1920, § 21995, which specifically permits compensation for the combined number of weeks for the loss of any two or more of such members 50 per centum of wages during the aggregate of the period specified for each.—*Bausch v. Fidler*, Pa., 121 Atl. 507.

65.—**Independent Cause.**—Where an employee guarding employer's property suffered an injury resulting from a holdup during working hours, the criminals not being after anything except the contents of his pockets, the injury did not arise out of his employment within the Workmen's Compensation Act.—*Bryden v. Industrial Accident Commission*, Calif., 215 Pac. 1085.

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Index-Digest

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